

NO. 5:04-CR-135-FL-1

ORDER

BACKGROUND

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COURT'S DISCUSSION

Under 28 U.S.C. § 1651(a), “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” The Fourth Circuit has applied § 1651(a) as a basis for the court’s jurisdiction in a criminal matter to “allow[] the granting of a writ of error coram nobis in light of a retroactive dispositive change in the law.” United States v. Mandel, 862 F.2d 1067, 1075 (4th Cir. 1988). “An error of the most fundamental character must have occurred to warrant issuing the writ, and no other remedy may be available,” such as where defendants “have served their sentences[,] . . . appealed their cases at each stage of the proceeding[, and] [t]hey have no other remedy available other than a writ of error coram nobis.” Id. The writ of coram nobis may apply where the court “improperly allowed petitioners’ convictions for acts which are not within the reach of the . . . statute of conviction.” Id.


Here, all the aforementioned conditions for application of § 1651(a) and the writ of error coram nobis are present. Where defendant has served his sentence and supervised release, no other remedy, such as writ of habeas corpus, is available for the relief sought. In addition, defendant was convicted for acts which are not within the reach of the statute of conviction, a determination based upon a “retroactive dispositive change in the law,” in light of Simmons. See Miller v. United States, 735 F.3d 141, 146 (4th Cir. 2013) (“Simmons altered the class of persons that the law punishes, and announced a substantive rule that is retroactively applicable.”). As the government concedes, petitioner’s prior conviction for sale and delivery of marijuana is no longer a felony for purposes of a conviction under 18 U.S.C. § 922(g) because it was punishable by less than one year imprisonment. (See DE 52-1). Accordingly, pursuant to § 1651, where the government waives any

procedural defenses and concedes the merits of defendant's motion, the court must vacate defendant's conviction and dismiss the indictment.

CONCLUSION

Based on the foregoing, the court GRANTS defendant's motion to vacate under 28 U.S.C. § 1651(a). Defendant's February 23, 2005, judgment of conviction is VACATED, and the indictment filed April 22, 2004, is DISMISSED.

SO ORDERED, this the 7th day of December, 2016.



LOUISE W. FLANAGAN
United States District Judge